



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 55 OF 2020

DEVSHIBHAI & SONS LIMITED.....APPELLANT

VERSUS

CATHERINE NDUKU MUYSOKA.....1ST DEFENDANT

JOSEPH WAMBUA MUSYOKA.....2ND DEFENDANT

ENGLISH PRESS LIMITED.....3RD DEFENDANT

RULING

1. Before me for determination is the applicant's Notice of Motion dated 25th February 2020 seeking the following substantive orders:

i. That this Honourable Court be pleased to grant leave to the Appellant to appeal from the decision delivered by the Chief Magistrate's Court at Milimani (Hon. D.W. Mburu) delivered on 17th January 2020.

ii. That pending the hearing and determination of this application, this Honourable Court be pleased to order stay of execution of the judgment issued in Milimani SPMCC No. 3442 of 2019 pending the hearing and determination of its appeal.

iii. That the costs of this application be provided for.

2. The application is supported by the grounds stated on its face and the depositions made in the affidavit sworn on 24th February 2020 by *Sanjay Purshottam Bhansali*, learned counsel for the appellant (applicant).

In the grounds premising the motion and in the supporting affidavit, the applicant, *Devshibhai & Sons Limited* contends that it is dissatisfied with the decision made by the trial court and has lodged an appeal against the said decision; that it has an arguable appeal with a probability of success and if stay of execution is not granted, execution will be levied against it and it will suffer substantial loss because if the appeal succeeded, it will be difficult to recover the decretal amount from the 1st respondent and its appeal will be rendered nugatory. The applicant pledged to abide by any condition the court may impose regarding security for the due performance of the decree.

3. The application is contested by the administrators of the estate of the late *Martin Musila Maithya* who are the 1st respondent in the application. In their joint replying affidavit sworn on 15th June 2020, the 1st respondent opposed the motion contending that the application was not been made in good faith and that it was aimed at delaying realization of fruits of their judgment; that the applicant has not availed evidence to demonstrate that it will suffer prejudice if the stay sought is not granted; that if the court was inclined to grant stay, it should be conditional upon the applicant being ordered to pay the respondents half of the decretal amount and the other half to be deposited in a joint interest earning account.

4. The 2nd respondent though served with the application did not file a response thereto and did not participate in the hearing of the application.

5. By consent of the parties, the application was prosecuted by way of written submissions which the applicant and the 1st respondent duly filed.

6. I have carefully considered the application, the affidavits on record and the rival written submissions filed by the parties. I note that though in prayer 2 of the motion the applicant sought leave to file an appeal out of time, that prayer is superfluous since a perusal of the court record shows that there is an appeal on record which the applicant filed on 10th February 2020 within the time prescribed for filing of appeals to the High Court. It is thus not clear why the applicant included such a prayer in the motion knowing fully well that it had already filed an

appeal in the matter. The fact that there is a valid appeal already in place explains why both parties did not make any reference to the prayer in their respective submissions.

7. Given the foregoing, the only prayer left for my determination is the applicant's prayer for stay of execution pending determination of the appeal. The law governing stay of execution pending appeal is set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. The provision lays down the preconditions for grant of stay pending appeal. The applicant must demonstrate that if stay is not granted, he or she will suffer substantial loss; that the application was filed timeously and that he was willing and ready to offer security for due performance of the decree.

8. Starting with the requirement that the applicant must show that the application was filed timeously, I note from the court record that the decision sought to be challenged on appeal was made on 17th January 2020. The appeal was filed on 10th February 2020. The application under consideration was filed on 25th February 2020 about two weeks later. I am thus satisfied that the application was filed within a reasonable time.

9. On substantial loss, the applicant has contended that if stay is not granted, it will suffer substantial loss as it is unlikely to recover the decretal amount if paid to the 1st respondent in the event that its appeal is successful. The 1st respondent in their replying affidavit did not respond to this claim. They appear to have supported the position taken by the applicant by averring that they have been having financial constraints after the accident and they were waiting for the decretal sums to be paid to enable them settle debts incurred during the deceased's interment.

10. Given that the decretal amount is KShs.1,123,970 exclusive of costs and interests, it is no doubt a substantial amount. Given the averments in the respondents replying affidavit, I find that the applicant's apprehension that it is unlikely to recover the decretal amount if paid to the respondents in the event that its appeal is successful is plausible and well founded. To that extent, I am satisfied that the applicant has demonstrated that it will suffer substantial loss as defined in *James Wangalwa & Another V Agnes Naliaka Chesoto, [2012] eKLR* if stay orders are not granted as sought. See also: *Equity Bank Limited V Tanga Adams Company Limited, [2016] eKLR*.

11. Since the applicant has pledged to provide any security that the court may order for due performance of the decree and considering my foregoing findings, I have come to the conclusion that the applicant has met the legal threshold for grant of orders of stay pending disposal of its appeal.

12. I consequently find merit in the application and since I have to balance the competing interests of the applicant and the respondents, I hereby allow the application in terms of prayer 3 on condition that the applicant deposits the entire decretal amount in a joint interest earning bank account operated by counsel on record for the applicant and the 1st respondent or have it deposited in court within 30 days of today's date. In default of compliance with this condition, the stay granted will automatically be discharged.

13. Costs of the application will abide outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Bhansali for the appellant/applicant

No appearance for the respondents

Ms Carol: Court Assistant